No. 93-1912

(3)

Supreme Court, U.S.
FILED
JUL 5 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

Did the Court of Appeals err in dismissing for lack of standing petitioners' appeal from a judgment finding a class action settlement in a product liability case to be fair, adequate and reasonable, where:

— the three petitioners were the only ones of more than 50,000 class members who appealed;

— petitioners were non-parties who neglected to file a motion to intervene until after they had already filed a notice of appeal; their belated motion to intervene was denied because the district court was divested of jurisdiction; the Court of Appeals affirmed the denial of intervention; and certiorari is not sought from that decision; and

— after studying the settlement terms, petitioners deliberately chose to join the settlement class rather than exercise their opportunity to opt out and pursue their long-standing parallel action that was pending in another court?

RULE 29.1 LISTING

Respondent Shiley Incorporated is a wholly-owned subsidiary of respondent Pfizer Inc. Shiley Incorporated has no subsidiaries that are not wholly owned.

Respondent Pfizer Inc has no parent company. The following is a list of its direct or indirect subsidiaries (except those that are wholly owned):

Subsidiary	Place of Incorporation
Pfizer Biogal L.L.C.	Hungary
Pfizer Egypt S.A.E.	Egypt
Pfizer Limited	Ghana
Pfizer Limited	India
Dumex Limited	India
Duchem Laboratories Limited	India
PT Pfizer Indonesia	Indonesia
Livestock Feeds PLC	Nigeria
Pfizer Products PLC	Nigeria
Pfizer Laboratories Limited	Pakistan
Pfizer Korea Limited	South Korea
Pfizer Pharmaceuticals Ltd.	People's Republic of China

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	iv
ADDITIONAL OPINION BELOW	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	7
I. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF APPELLATE STANDING ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEALS	7
II. THE DECISION BELOW IS SUPPORTED BY THE TEXT OF THE FEDERAL RULES AND THE POLICIES UNDERLYING CLASS ACTIONS SET FORTH IN THIS COURT'S DECISIONS	11
III. THE UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT	17
IV. PETITIONERS' "DUE PROCESS" ARGUMENT WAS NOT RAISED BELOW, IS MERITLESS AND DOES NOT DESERVE REVIEW BY THIS COURT	19
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	PAGE
American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974)	13
Angus v. Shiley Inc., 989 F.2d 142 (3d Cir. 1993)	18
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	20
Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993)	9
Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992)	2, 3, 4, 5, 8
Brinkman v. Shiley, Inc., 732 F. Supp. 33 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989)	18
Carlough v. Amchem Products, Inc., 5 F.3d 707 (3d Cir. 1993)	9, 17
Cohen v. Young, 127 F.2d 721 (6th Cir. 1942)	6, 20, 21
Croyden Associates v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993)	6, 8, 13, 14, 15, 17
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	19
E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112 (1977)	10
Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993)	8, 9, 10, 14, 15, 17, 21, 22
Guarino v. Brookfield Township Trustees, 980 F.2d 399 (6th Cir. 1992)	21

PAGE

Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) 6, 13, 14, 15, 17, 21

Hansberry v. Lee, 311 U.S. 32 (1940) 13

Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Phillips Corp., 114 S. Ct. 425 (1993) 11

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 17

Loran v. Furr's/Bishop's Inc., 988 F.2d 554 (5th Cir. 1993) 8

Marino v. Ortiz, 484 U.S. 301 (1988) 7, 8, 9, 10, 11, 15, 16, 20, 21

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 13

Police Officers for Equal Rights v. City of Columbus, 865 F.2d 260 (Table), 1988 WL 132696, 1988 U.S. App. LEXIS 17044 (6th Cir. 1988) 20, 21

Preslar v. Secretary of Health and Human Services, 14 F.3d 1107 (6th Cir. 1994) 21

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 17

Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council, 459 F.2d 579 (6th Cir. 1972) 20, 22

Shores v. Sklar, 844 F.2d 1485 (11th Cir. 1988) 8

Thompson v. Kentucky, 827 F.2d 770 (Table), 1987 WL 44540, 1987 U.S. App. LEXIS 11297 (6th Cir. 1987) 20

Ticor Title Insurance Co. v. Brown, 114 S. Ct. 1359 (1994) 17

PAGE

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 16

United States v. Mendoza, 464 U.S. 154 (1984) 10

United States v. Reece, 994 F.2d 277 (6th Cir. 1993).. 21

United States v. Tipton, 11 F.3d 602 (6th Cir. 1993), *cert. denied*, ___ S. Ct. ___, 1994 WL 213324 (June 13, 1994) 21

In re VMS Limited Partnership Securities Litigation, 976 F.2d 362 (7th Cir. 1992)..... 8

Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988) 6, 8, 13, 14, 15, 17

Wills v. Texas, 114 S. Ct. 1867 (1994) 20

Youakim v. Miller, 425 U.S. 231 (1976) 19

Statutes and Rules

28 U.S.C. § 1254(1)..... 11

28 U.S.C. § 1291 22

Fed. R. Civ. P. 23 .....2, 9, 12, 13, 14

Fed. R. Civ. P. 23(b)(2) 17

Fed. R. Civ. P. 23(b)(3) 14, 17

Fed. R. Civ. P. 23(c)(1) 4

Fed. R. Civ. P. 23(c)(2) 4, 12

Fed. R. Civ. P. 23(d) 11, 12

Fed. R. Civ. P. 23(e)..... 4, 5

Fed. R. Civ. P. 23.1..... 9

PAGE

Fed. R. Civ. P. 24 ..... 2, 12

Fed. R. App. P. 3 2

Fed. R. App. P. 3(c) 7, 11

Supreme Court Rule 10.1 17

Sixth Circuit Rule 24(c) 21

Miscellaneous

Advisory Committee Notes on the 1966 Amendments to Fed. R. Civ. P. 24 12

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1967) 12

Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933 (1993) 15

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents Pfizer Inc and Shiley Incorporated oppose the Petition for a Writ of Certiorari, which seeks review of a Court of Appeals decision dismissing an appeal from a judgment approving a class settlement. Petitioners are non-party class members who failed to file a timely motion to intervene in the district court. The Court of Appeals dismissed petitioners' appeal based on settled principles of appellate standing established by this Court and consistently applied by the Courts of Appeals. Further, petitioners (a) failed to move to intervene until after the district court had been divested of jurisdiction; (b) passed up repeated opportunities to exclude themselves from the class and pursue their own previously-filed parallel action against the defendants in state court; and

(c) attempted to challenge on appeal a class settlement that they deliberately chose to join. These unusual facts, which are unlikely ever to be repeated, render this case unsuitable for review by this Court.

ADDITIONAL OPINION BELOW

The decision of the district court, from which appeal was taken, is reported at 143 F.R.D. 141 (S.D. Ohio 1992).

STATUTES AND RULES INVOLVED

The petition involves the following rules: Rules 23 and 24 of the Federal Rules of Civil Procedure and Rule 3 of the Federal Rules of Appellate Procedure. The pertinent provisions of these rules are set forth in the appendix hereto.

STATEMENT OF THE CASE

This class action was settled on terms satisfactory to the defendants, the class representatives and the overwhelming majority of class members. Of more than 50,000 members of the class, only three—the petitioners—seek to overturn the settlement on appeal.

The three petitioners had full opportunity to exclude themselves from the class *after* they studied the settlement terms. They chose to remain class members. Then, after the district court entered a judgment approving the settlement as fair, adequate and reasonable, they filed a notice of appeal. The Court of Appeals dismissed the appeal on the ground that petitioners—having failed to become parties by intervening in the district court—lacked standing to appeal.

This action was brought on April 19, 1991, on behalf of recipients of an artificial heart valve and their spouses. Artificial heart valves, made of metal and synthetic materials,

are surgically implanted to replace diseased and failing human heart valves. Prior to the development of early models of artificial heart valves some 30 years ago, all persons who suffered from diseased heart valves became seriously disabled and soon died from their illness. Respondent Shiley was a pioneer in developing artificial heart valves, which have saved tens of thousands of lives.

The class was defined to include only those Shiley artificial heart valve recipients whose valves continued to function as expected to sustain their lives without adverse incident. The class members' claims were *not* based upon any failure or malfunction of their valves, but solely upon their alleged concern about the small chance of malfunction sometime in the future. At the time the action was settled, such claims—to recover for alleged anxiety about a working device—had been rejected as a matter of law by some 27 courts around the country, including the Courts of Appeals for the Third, Fourth, Fifth, Eighth and Ninth Circuits. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147, 162-63, 165 (S.D. Ohio 1992).[1] The class settlement provides not only cash payments, but also medical and health benefits which the overwhelming majority of class members—many of whom are aged and ill from underlying heart disease—desire to receive as soon as possible.

Settlement negotiations between defendants and the class representatives began in July, 1991, and culminated in the execution of an agreement on January 23, 1992. (Record

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[1] Petitioners' assertion that these cases involved "merely . . . negligence and product liability theories" rather than "fraud and other intentional torts" (Petition for Writ of Certiorari ("Pet.") at 3) is incorrect. Fraud or other intentional torts were alleged in many of the cases; the courts nevertheless held that there is no cause of action under any theory for concern that a properly functioning product might fail. However, as the district court observed, "[o]ne California court allowed the plaintiff with a properly functioning heart valve past the summary judgment stage of litigation, based on a fraud theory." *Bowling*, 143 F.R.D. at 147.

("R.") 48, attachment).[2] As authorized by Fed. R. Civ. P. 23(c)(1), the district court then conditionally certified the class for purposes of settlement.[3] (R. 43). Pursuant to Fed. R. Civ. P. 23(c)(2) and (e), the court approved the notice of the settlement to be provided to class members. (R. 44). At an estimated cost of over $4 million, the notice was mailed to every valve recipient for whom an address was known and was published in over 200 leading publications throughout the world. (R. 162, Pines Affidavit Exs. A, B; R. 202 at 26). The notice informed each class member of the opportunity to opt out of the class. (R. 44, Exs. A, B).

The three petitioners—two valve recipients and the spouse of one of them—are the named plaintiffs in an uncertified state-wide class action filed in 1986 against the defendants in the Pennsylvania Court of Common Pleas (*Taylor v. Shiley, Inc.*, No. 2087). In February 1992, petitioners received notice of the class settlement in this case through their counsel, and were thus expressly informed of their opportunity to exclude themselves from the class. Notwithstanding the fact that they had their own pending case against defendants, they elected to remain in the class. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 155-56 (S.D. Ohio 1992).

Petitioners state that the class notice "informed petitioners that they could not object to . . . the proposed settlement if they elected to opt out of the class." (Pet. at 5). This is untrue. On May 19, 1992, before the opt out deadline, the district court told petitioners that they were free to opt out and also press their objections to the settlement. (R. 140 at 28; R. 202 at 8). As the district court stated in its opinion, petitioners' counsel "was free to have opted its clients out, and then could

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[2] Citations to the record are to the district court docket numbers.

[3] Petitioners state that the conditionally certified class was broader than that alleged in the original complaint (Pet. at 4), but they fail to mention that the complaint was amended to allege the broader class. (R. 47).

have voiced its objections to the proposed settlement at the fairness hearing." *Bowling*, 143 F.R.D. at 156. Petitioners turned this opportunity down, as well as two other opportunities—on June 9 and July 22, 1992—to opt out *after* they had appeared and objected to the settlement. (R. 208 at 92-95; R. 251 at 82-83).

Pursuant to Fed. R. Civ. P. 23(e), the district court conducted a fairness hearing on the proposed settlement on June 5, 8 and 9 and July 22, 1992. Petitioners, other class members and consumer advocacy groups were heard at length. As a result of suggestions by the court and counsel, the initial settlement agreement was substantially enhanced.[4] All class members represented by counsel—except for petitioners—as well as consumer advocate *amici*, then withdrew their objections. (*See* R. 251 at 56-61).

On August 19, 1992, the district court issued a 68-page order finding that the settlement is "fair, adequate and reasonable." *Bowling*, 143 F.R.D. at 170. Judgment was entered on September 10, 1992. (R. 255). Petitioners filed a notice of appeal from that judgment on September 17, 1992. (R. 258).

The three petitioners were the *only* class members who continued to express dissatisfaction with the judgment approving the settlement.[5] Yet petitioners did not ask any court to relieve them personally from that judgment. Instead, petitioners—who represent no one but themselves—sought to *overturn* on appeal the judgment that tens of thousands of their fellow class members desired.

At no time prior to petitioners' filing of a notice of appeal did they move to intervene. Petitioners' assertion that "the

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[4] The settlement approved by the district court provides benefits to class members worth at least $165 million and possibly more than $215 million. The settlement, which is mischaracterized by petitioners, is accurately described in the opinion of the district court. *Bowling*, 143 F.R.D. at 148-50.

[5] The petition for certiorari is brought solely on petitioners' own behalf and not on behalf of the uncertified *Taylor* class.

district court gave every indication that intervention was *not* required" (Pet. at 7) is untrue. The district court treated them as objecting class members, nothing more.

On September 25, 1992, eight days after they had filed a notice of appeal, petitioners belatedly filed a motion in the district court to intervene for purposes of appeal. (R. 265). By memorandum decision dated November 9, 1992, the district court concluded that it could not decide the motion to intervene because the filing of the notice of appeal had divested it of jurisdiction. (R. 297). Petitioners appealed from that decision as well. (R. 305).

On December 21, 1993, the Sixth Circuit affirmed the district court's order concluding that it lacked jurisdiction to rule on a motion to intervene filed in the district court after a notice of appeal. (Pet. App. at 6a). Petitioners have not sought certiorari with respect to that decision.

Also on December 21, 1993, the Court of Appeals issued the order for which certiorari is sought, which dismissed petitioners' principal appeal. The Court held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 1a). In support of its decision, the Court cited *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988)—all of which held that non-party class members do not have standing to appeal.

Petitioners then petitioned for rehearing *en banc*, relying—as they do now—on the decision in *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), and the supposed inconsistency between that case and more recent unpublished decisions of the Sixth Circuit. By letter dated February 1, 1994, the Court of Appeals directed respondents to file a response, "and respond particularly to the significance of *Cohen* . . . ." As requested, respondents showed that *Cohen* was not only dis-

tinguishable, but is also outdated in light of subsequent decisions of this Court and the 1966 amendments to the class action rules.[6]

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc*. The Court noted that the petition had been circulated to all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hearing panel had "further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." (Pet. App. at 3a).

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF APPELLATE STANDING ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEALS.

The issue raised in the petition has already been resolved by this Court. In *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), the Court authoritatively ruled that "only parties to a lawsuit, or those that properly become parties [by intervening], may appeal an adverse judgment . . . ." The Court pointed out that the Federal Rules of Appellate Procedure provide that "[t]he notice of appeal shall specify the *party or parties* taking the appeal." Fed. R. App. P. 3(c) (emphasis added).

Marino affirmed dismissal of an appeal by a group of white police officers who appeared and objected to a proposed settlement of a class action brought by Hispanic members of the New York City Police Department. This Court held that the officers lacked standing to appeal, notwithstanding their par-

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[6] Defendant-Appellees' Memorandum in Opposition to Appellants' Petition for Rehearing *En Banc*, filed February 15, 1994.

ticipation in the proceedings below, because they "were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal." *Id.* at 304.

Following *Marino*, every Court of Appeals to be presented with an appeal from a class action judgment brought by non-party class members has ruled that non-party class members—like petitioners—do not have standing to appeal. *Bowling v. Pfizer*, No. 92-3973 (6th Cir. 1993) (Pet. App. at 1a); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

Thus, for example, the Eighth Circuit observed that "*Marino* provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679.

Petitioners' principal argument for certiorari is that there is a supposed "split" among the Circuits. However, the cases that petitioners cite either were decided prior to *Marino*, or did not directly present the issue.

Not one of the post-*Marino* cases relied on by petitioners granted non-party class members standing to appeal from a judgment approving a settlement in a class action. In one case cited by petitioners, *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), the Seventh Circuit held that non-party class members did *not* have standing to appeal a post-settlement order implementing a settlement agreement. The Court specifically stated that "we offer no opinion" as to whether non-party class members would have standing to appeal from a judgment approving the settlement. 976 F.2d at 368 n.8.

Similarly, *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993), cited by petitioners, is tangential to the issue raised here. *Bell Atlantic* involved the appellate standing of an objecting shareholder in a shareholders' derivative action. The Court stated that "we need not decide whether different rules apply to objector appellate standing in class and derivative suits." 2 F.3d at 1307 n.4. Subsequently, the Tenth Circuit thoroughly analyzed *Bell Atlantic* and concluded that it was "inapposite" to the appellate standing of non-party class members, who differ from plaintiffs in shareholder derivative suits. *Gottlieb*, 11 F.3d at 1010.[7]

The final post-*Marino* case relied on by petitioners is *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), where the Court—without even citing *Marino*—said that class members who timely moved to intervene would be able to appeal from a final judgment. However, unlike this case, *Carlough* was not an appeal from a final judgment by non-party class members who failed to file a timely motion to intervene. Rather, *Carlough* was an interlocutory appeal from the denial of the class members' motion to intervene; the Third Circuit dismissed the appeal on the ground that the denial of the motion to intervene was not immediately appealable. Thus, *Carlough* did not squarely present the issue raised by the petition.

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[7] The Tenth Circuit explained why derivative suit cases such as *Bell Atlantic* are not on point:

> "[C]ases holding that an unnamed plaintiff in a shareholder derivative suit under Rule 23.1 has standing to appeal are inapposite. *See, e.g., Bell Atlantic* . . . . Rule 23.1 does not offer the same protective mechanisms offered by Rule 23. Unlike class actions under Rule 23, in shareholder derivative suits under Rule 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members is not a prerequisite to the maintenance of the action. . . . In addition, there is no opt out provision in shareholder derivative suits."

Gottlieb, 11 F.3d at 1010-11.

It remains to be seen if the Third Circuit will find non-party class members to have standing to appeal from a class action judgment when that Court is actually presented with such an appeal and is asked to consider the issue in light of *Marino*. At the very least, because the Third Circuit has not yet had occasion to apply *Marino* to an appeal from a final judgment by a non-party class member who failed to file a timely motion to intervene, this Court would benefit by allowing the issue to mature. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (indicating the benefits of permitting the Courts of Appeals "to explore a difficult question before this Court grants certiorari"); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

The Tenth Circuit recently surveyed the very same cases relied upon by petitioners and found that "there is no true conflict." *Gottlieb*, 11 F.3d at 1009. The Court stated: "We hold that standing [of a non-party class member to appeal] is dependent upon a grant of intervention, *a result which we believe to be consistent with the rule in all of the circuits that have directly addressed the issue . . .*" 11 F.3d at 1006 (emphasis added).

In short, the purported "conflict" relied on by petitioners is an illusion. On appeals from final judgments in class actions, the Courts of Appeals have uniformly held, subsequent to this Court's decision in *Marino*, that non-party class members do not have standing to appeal. There is no reason for this Court to grant review.

II. THE DECISION BELOW IS SUPPORTED BY THE TEXT OF THE FEDERAL RULES AND THE POLICIES UNDERLYING CLASS ACTIONS SET FORTH IN THIS COURT'S DECISIONS

The decision below is amply supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied on the text of the Federal Rules of Appellate Procedure in holding that "only *parties* to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304 (emphasis added). As the Court stated, Fed. R. App. P. 3(c) specifically requires that the notice of appeal specify the "party or parties" taking the appeal. *Id.*

This Court applied the same reasoning earlier this Term in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Phillips Corp.*, 114 S. Ct. 425 (1993). There, the petitioner was a non-party whose motion to intervene was denied by the Court of Appeals. This Court dismissed the writ of certiorari as improvidently granted because the petitioner lacked standing to seek review. The court explained that the language of the statute creating the certiorari jurisdiction of this Court—28 U.S.C. § 1254(1)—speaks of "the petition of any *party* to any civil or criminal case . . . ." (Emphasis added).

The decision below is also supported by the language of the class action and intervention provisions of the Federal Rules of Civil Procedure. Those provisions make clear that absent intervention, class members are *not* parties to the action, and do not have the unqualified right to participate at every stage of the litigation in the district court and on appeal.

Thus, Rule 23(d) provides that "the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . of the opportunity of members . . . to intervene . . . ." The Rule further states that the Court may "impos[e] conditions . . . on intervenors . . . ." As

shown by these provisions, the district court has broad discretion under Rule 23 to consider whether, and on what terms, individual class members should be permitted to intervene consistent with the prompt and efficient management of the litigation. If class members were entitled to participate as parties in all aspects of the action even without intervention, then the provisions of Rule 23(d), giving the court authority upon a proper showing to permit *or deny* intervention by class members, and to impose conditions on intervenors, would be superfluous.

Consistent with the language of the Federal Rules, the Advisory Committee Notes on the 1966 Amendments to Fed. R. Civ. P. 24 state that "[a] class member who claims that his 'representative' does not adequately represent him, and is able to establish that proposition with sufficient probability . . . should, as a general rule, be entitled to intervene in the action." Thus, the Federal Rules contemplate that if non-party class members wish to participate as parties in a class action, they must first intervene.[8]

Moreover, automatically permitting all non-party class members to appeal would be impractical and antithetical to the policies and purposes of Rule 23. Rule 23 sets forth a pro-

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[8] The Federal Rules distinguish between intervention and "entering an appearance through counsel." Any class member may "enter an appearance through counsel," Fed. R. Civ. P. 23(c)(2). This is not, however, the equivalent of intervention. As Professor Benjamin Kaplan, the reporter to the Advisory Committee, explains:

> "I read this 'appearance' as entitling counsel to receive the papers in the action to enable him to follow the case with a view to deciding, *e.g.*, whether he should move to intervene. If 'appearance' is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under Rule 24, which is not automatic and requires a showing."

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 n.137 (1967).

cedure through which common issues can be efficiently litigated in a single suit "when there are too many plaintiffs for proper joinder." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). The rule seeks to *avoid* multiplicity of activity by providing for a " 'representative' suit to which some members of the class are parties, [who] may bind members of the class or those represented who were not made parties to it." *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). As this Court has explained:

> "A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions."

American Pipe & Construction Co. v. Utah, 414 U.S. 538, 550 (1974). Accordingly, Rule 23 is structured to provide each class member with "procedural due process protection[s]" without being "fully a party in the traditional sense." *Shutts*, 472 U.S. at 808, 811-12.

The goals of manageability and efficiency would be compromised if each class member could individually decide to appeal. As the Eleventh Circuit explained:

> "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. . . . If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court *would defeat the very purpose of class action lawsuits*."

Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987) (emphasis added); *accord Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1074 (a non-party class member may not appeal absent intervention in the court below; "a contrary rule would result in the

frustration of the purpose behind class litigation"); *Gottlieb*, 11 F.3d at 1009 ("If individual appeals without formal intervention were to be permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.").

The Courts of Appeals have also pointed out that permitting appeals by non-party class members would be inconsistent with the representative nature of class actions. *Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1073; *Guthrie*, 815 F.2d at 628. The problem is underscored by this case. The class representatives, who were determined by the district court to be adequate, are satisfied with the judgment and want its benefits now. Petitioners, who represent no one but themselves, seek to overturn that judgment against the wishes of the class representatives and the overwhelming majority of the class. "It is particularly appropriate" to dismiss an appeal by a non-party class member when the "class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members." *Croyden*, 969 F.2d at 680.

Moreover, automatically permitting appeals by non-party class members without intervention is unnecessary to protect the class members' individual interests. In Rule 23(b)(3) actions, such as this, class members can protect their interests by exercising their right to opt out and pursue their own actions. *Croyden*, 969 F.2d at 678; *Guthrie*, 815 F.2d at 628; *Gottlieb*, 11 F.3d at 1009. Alternatively, if individual class members believe that they are not represented adequately by the class representatives, they can protect their interests by moving to intervene; or they can seek to avoid the effect of an adverse judgment by collateral attack. *Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1073-74; *Guthrie*, 815 F.2d at 628. "With these legal avenues available for individual class members, there is no need to permit an individual to appeal a judgment with which the class representatives, and presumably the

majority of the class members are satisfied." *Guthrie*, 815 F.2d at 628; *Croyden*, 969 F.2d at 678.

Petitioners ignore both the language of the Federal Rules and the policies underlying class actions set forth in decisions of this Court and the Courts of Appeals.[9] Instead, they incorrectly assert that "an appeal is often the only mechanism by which an absent class member can protect his or her rights" and that the right to opt out does not provide adequate protection because class claims are "frequently" too small to justify individual litigation. (Pet. at 14). But neither the Court below nor any other Circuit has held that a class member may never appeal; they merely held that intervention is a precondition. Certainly, any class member with the wherewithal to appeal will also have the wherewithal to file a motion to intervene. Petitioners' argument is also beside the point on the facts of this case: the petitioners *did* have their own pending separate action against the defendants, which they had been pursuing since 1986; they had repeated opportunities to opt out in order to continue pursuing that action; and they chose not to avail themselves of those opportunities.

Next, petitioners state that the intervention requirement will have "the practical effect of drastically limiting the availability of appellate review" of judgments in class actions. (Pet. at 18). The gravamen of petitioners' argument is that motions to intervene will often be denied (a) because the class members are already adequately represented by the class representatives, (b) because the class members can protect their rights by opting out, or (c) because the class members have their own separate action, as petitioners do here. (Pet. at 20-22).

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[9] Petitioners rely heavily on a law review note, Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933 (1993). The Tenth Circuit has stated that it "disagree[s] with this student's analysis," *Gottlieb*, 11 F.3d at 1012 n.7, as does every Court of Appeals to have squarely addressed the issue since *Marino* was decided.

However, when class members are already adequately represented or have alternative means of protecting their rights—and a motion to intervene is denied on that ground—there is no reason to give them standing to appeal. Thus, the fact that many intervention motions may properly be denied weighs strongly *against* granting all class members standing to appeal.

In addition, petitioners' generalizations about whether motions to intervene will be granted or denied are speculative at best. In this case, it is impossible to determine whether intervention would have been granted or denied, because petitioners failed to file a motion to intervene until after the district court had been divested of jurisdiction. Thus, a concrete factual setting is missing, and petitioners are forced to rely on unsupported speculation.

Petitioners also speculate that requiring intervention as a prerequisite to appeal "will result in greatly protracted and burdensome class action litigation." (Pet. at 23). But this theory is spun from petitioners' false assumption that class members would have to move to intervene as soon as they receive notice of the action. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), holds to the contrary. In that case, this Court held that a motion to intervene solely for purposes of appeal may be timely even if made after judgment. *Accord Marino*, 484 U.S. at 304. Petitioners do not explain why the procedure recommended by this Court would be an undue burden on litigants or the courts. Nor do they present any evidence that the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits, which have all required intervention as a prerequisite to appeal, have encountered anything resembling the parade of horribles that petitioners have conjured up.

In short, the decision below is firmly rooted in the language of the Federal Rules, the decisions of this Court, and the policies that underlie class actions. Petitioners' arguments to the contrary are without merit.

III. THE UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT

Even if the issues raised in the petition were otherwise worthy of this Court's attention, the unusual facts of this case—which are unlikely ever to be repeated—make it unsuitable for certiorari. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10.1. As this Court has stated:

> "[T]his Court does not sit to satisfy a scholarly interest . . . . Nor does it sit for the benefit of the particular litigants. . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). Therefore, the issue must be of broad importance to the public, not merely to the litigants. *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

An unusual set of facts renders this case unworthy of this Court's discretionary review:

• Petitioners decided not to opt out *after* they studied the terms of the proposed settlement. Yet they seek to overturn on appeal a settlement that they deliberately chose to join. Such circumstances, if not unprecedented, are rare indeed.[10]

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[10] Many of the decided cases, including *Guthrie*, *Croyden* and *Walker*, have concerned classes that were certified under Rule 23(b)(2) and thus did not provide class members with the opportunity to opt out. In other cases, such as *Gottlieb*, the class was certified under Rule 23(b)(3) before settlement was reached; thus, the class members did not know the settlement terms when they had to decide whether to opt out. In *Carlough*, it remains to be seen whether individual class members will appeal should the pending proposed settlement be approved.

• Petitioners already had their own separate lawsuit (*Taylor*) pending against defendants in the Pennsylvania Court of Common Pleas, which they had been pursuing since 1986.[11] If petitioners thought that they were "well situated to obtain a sizable recovery" in *Taylor* (Pet. at 3), they were free to opt out and pursue that case. As petitioners admit (Pet. at 22 n.18), this fact casts doubt on whether a timely motion to intervene by petitioners would have succeeded. This highlights the fact that petitioners' rights were adequately protected and that they have not been deprived of any substantive right.

• The district court in this case gave petitioners the opportunity to opt out and *also* object to the settlement at the fairness hearing. Indeed, the court gave petitioners second and third opportunities to opt out *after* their objections were heard. These generous offers—far more than what was

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[11] Petitioners misstate the course of proceedings in the *Taylor* case. Petitioners waited three years after filing *Taylor* to move for class certification, and have never succeeded in obtaining certification. In 1987, the Pennsylvania Court of Common Pleas *granted* defendants' preliminary objections to the *Taylor* complaint as to all but two claims (intentional infliction of emotional distress and Magnuson-Moss Act warranty claims). Subsequently, defendants were granted summary judgment on all claims, including a claim of intentional misrepresentation, in another Pennsylvania case. *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989); *accord Angus v. Shiley Inc.*, 989 F.2d 142, 147 (3d Cir. 1993). Based on *Brinkman* and other developments in Pennsylvania law—which conclusively negated any cause of action—defendants then moved for summary judgment. The summary judgment motion was pending at the time the settlement below was approved. Petitioners have admitted—contrary to their assertions in the petition for certiorari (Pet. at 3)—that their claims in Pennsylvania probably would not survive summary judgment. (R. 335 at 7; R. 334, Ex. C-1).

In the eight years since *Taylor* was filed, petitioners have not taken a single deposition. (*See* R. 225, Ex. 4). Petitioners' failure to prosecute the *Taylor* action is due to no fault of defendants: as petitioners have admitted to the Pennsylvania court, defendants' counsel has been " 'cooperating' and using its 'best efforts' to facilitate plaintiffs' discovery." (R. 225, Exs. 1-3).

required by the Federal Rules—were rejected. Petitioners chose to remain in the class and seek to disrupt and delay the settlement that the class representatives and all other class members desire.

• Due to petitioners' neglect, no record has been developed as to the propriety of intervention in this case. Petitioners failed to file a motion to intervene until after they had filed a notice of appeal which divested the district court of jurisdiction. If they had filed a timely motion to intervene and intervention had been granted, the question of standing to appeal would never have arisen. If, on the other hand, a timely motion to intervene had been denied, this Court as well as the Court of Appeals would have had the benefit of the reasons given by the district court for denying intervention. As the case stands, petitioners call upon the Court to assess their issue in a vacuum.

In sum, the unusual and atypical facts of this case make it unsuitable for certiorari review.

IV. PETITIONERS' "DUE PROCESS" ARGUMENT WAS NOT RAISED BELOW, IS MERITLESS AND DOES NOT DESERVE REVIEW BY THIS COURT

Petitioners argue that the dismissal of their appeal violated their constitutional right to due process of law. However, this argument was not raised below, and it is settled that "ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *accord Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question . . . not raised in the Court of Appeals . . . is not properly before us).[12]

[12] On page 5 of their petition for rehearing *en banc*, petitioners included rhetoric that in dismissing their appeal, the Sixth Circuit "created the unavoidable impression that [it] not only was biased in favor of Appellees, but that it was not bound by . . . Appellants' right to due process under the Constitution." This is not sufficient to preserve the issue for review by this Court. First, "[i]t has been the traditional practice of

Moreover, as set forth below, petitioners' argument is based on contested factual allegations (which this Court is ill-equipped to resolve) and on a misunderstanding of the local rules of the Sixth Circuit (which are best left for the Sixth Circuit to interpret for itself).

Petitioners first contend that they were "lulled into a false sense of security" by the district court, which treated them as "*de facto* intervenors." (Pet. at 26). Nothing of the sort took place. Petitioners were treated as objecting class members, no more. At no time did the district court indicate that petitioners were parties to the action, or that they would be treated as intervenors.

In *Marino*, this Court rejected the proposition that appearing at a fairness hearing to object to a settlement—as petitioners did—confers standing to appeal. 484 U.S. at 304. One thing is certain: petitioners' allegation that they were "lulled into a false sense of security" does not present any serious, broadly applicable issue deserving of this Court's attention.

Petitioners next assert that they had a constitutional right to expect the Sixth Circuit to follow two of its older, pre-*Marino* published decisions,[13] notwithstanding this Court's subsequent decision in *Marino* and the Sixth Circuit's more recent decisions holding that a non-party class member lacks standing to appeal. *See Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (6th Cir. 1988) (unpublished, text available on LEXIS and WESTLAW); *Thompson v. Kentucky*,

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this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 114 S. Ct. 1867, 1867 (1994) (O'CONNOR, J., concurring in denial of certiorari). Second, a "vague appeal to constitutional principles does not preserve . . . due process claims." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

[13] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

827 F.2d 770 (Table) (6th Cir. 1987) (unpublished, text available on LEXIS and WESTLAW).

Petitioners proceed under the misapprehension that unpublished decisions of the Sixth Circuit may not be relied on. The Rules of the Sixth Circuit specifically provide that "[i]f counsel believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision *may be cited* . . . ." Sixth Circuit Rule 24(c) (emphasis added). Indeed, the Sixth Circuit routinely cites its unpublished decisions as precedent.[14]

While petitioners state that "it is difficult to state precisely where the Sixth Circuit stands" (Pet. at 15), the Tenth Circuit had no trouble determining the Sixth Circuit's position, based on the Sixth Circuit's unpublished decision in *Police Officers*:

> "We . . . note that the Sixth Circuit recently followed *Guthrie*, holding that unnamed class members had no standing to appeal from the approval of a settlement. *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (6th Cir. 1988) (unpublished disposition, text available on LEXIS)."

Gottlieb, 11 F.3d at 1010 (footnote omitted).

In any event, the Sixth Circuit is best positioned to determine the current state of the law in the Sixth Circuit. In its initial decision and then on rehearing, the Sixth Circuit determined that its pre-*Marino* decisions do not control this case.[15]

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[14] *See, e.g., Preslar v. Secretary of Health and Human Services*, 14 F.3d 1107, 1112 (6th Cir. 1994); *United States v. Tipton*, 11 F.3d 602, 607 (6th Cir. 1993), *cert. denied*, ___ S.Ct. ___, 1994 WL 213324 (June 13, 1994); *United States v. Reece*, 994 F.2d 277, 278-79 (6th Cir. 1993); *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-05 n.5 (6th Cir. 1992).

[15] *Cohen* was a shareholder derivative suit brought on behalf of a corporation; accordingly, there was no opportunity for the shareholder-

No judge on the Sixth Circuit considered the issue deserving of *en banc* consideration. Petitioners do not raise any issue of general applicability and public importance requiring this Court's review.

Petitioners' constitutional argument suffers from another infirmity as well. Petitioners state that *when there is a right to appeal*, that right may not arbitrarily be denied. However, there is no right to appeal when an appellant lacks standing to appeal.[16] Petitioners' argument, therefore, is inapposite.

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plaintiff to opt out. Because "there is no opt out provision in shareholder derivative suits," such cases are "inapposite." *Gottlieb*, 11 F.3d at 1010-11.

Similarly, *Sertic* did not directly present the issue here. Included in the *Sertic* appeal was an appeal from the district court's denial of motions to intervene; the Court held that intervention should have been granted. 459 F.2d at 581, 583. Here, in contrast, petitioners failed to move intervene until after their appeal on the merits had deprived the district court of jurisdiction; the Court of Appeals affirmed the district court's denial of the belated motion; and petitioners do *not* seek review of that decision.

[16] Contrary to petitioners' assertion (Pet. at 28), 28 U.S.C. § 1291 simply grants appellate jurisdiction to the Courts of Appeals. It does not do away with settled principles of appellate standing.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Dated: New York, New York
July 1, 1994

Respectfully submitted,

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APPENDIX

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PERTINENT PROVISIONS OF THE RULES INVOLVED

Rule 23 of the Federal Rules of Civil Procedure in pertinent part provides:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
>
> **(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**
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> * * *
>
> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable

> effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.
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> * * *
>
> **(d) Orders in Conduct Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members . . . of the opportunity of members . . . to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors . . . .
>
> **(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24 of the Federal Rules of Civil Procedure in pertinent part provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the

applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 3 of the Federal Rules of Appellate Procedure in pertinent part provides:

(c) **Content of the Notice of Appeal.** A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. . . . In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class.